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IN THE

Supreme Court of the United States

October Term 1965

No. 488

MRS. ADELLE HULLUM, ADMINISTRATRIX,
Petitioner

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner, Mrs. Adelle Hullum, Administratrix, respectfully calls to the attention of the Court that she and other railroad employee litigants in Texas Courts have been and are continuing to be deprived of their federally created rights under the Federal Employers Liability Act, (Title 45 U.S.C., Section 51 et seq. as amended) by local practice and procedure in the Texas Courts.

Petitioner respectfully urges reconsideration by this Honorable Court of her Petition for Writ of Certiorari, which was denied by an order entered November 8, 1965, and particularly the first three questions presented, as follows:

QUESTIONS PRESENTED

I. To accord Petitioner a fair trial, did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the holding of the Court of Civil Appeals, the trial Court properly refused to submit to the Jury Petitioner's Requested Issues No. 1-A and 2-A, inquiring as to the negligence and proximate cause as to the "kicking of cars on the occasion in question on a downgrade"?

II. To accord Petitioner a fair trial, did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the Court of Civil Appeals holding the trial court properly refused to submit to the Jury Petitioner's Requested Special Issues Nos. 3-A, 4-A and 5-A inquiring as to the fact of, Respondent's negligence and proximate cause as to the defendant's crew kicking cars in question "without first determining that J. T. Hullum was in a safe position aboard the car he was riding"?

III. To accord Petitioner a fair trial did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the Court of Civil Appeals holding the trial court properly refused to submit to the Jury Petitioner's Specially Requested Instruction No. 2 reading:

"You are further instructed that the Defendant Railroad is under a continuing non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonably safe place within which to work."

Petitioner alleged that the Respondent's negligence included the kicking the cars in question on a downgrade and in kicking the cars in question without *first determining* that the decedent was in a safe position aboard the car he was riding, which in whole or in part proximately caused his injuries and death.

The proof showed that there was no necessity for kicking the cars on a downgrade, and that the engine foreman who gave the signal for kicking the cars did not first determine that the Petitioner's decedent was in a safe position aboard the cars, although it was his duty to know such fact before kicking the cars.

The Petitioner's suit, being filed in the District Court of Smith County, Texas, was submitted to the jury upon Special Issues, a practice peculiar to Texas. Special Issues were requested by Petitioner to be submitted to the jury inquiring as to negligence alleged and proved in kicking the cars on a downgrade and without first determining that the decedent was in a safe place aboard the car he was riding. These requested Special Issues were erroneously refused by the Trial Court, and the jury was not permitted to pass on such negligence.[1]

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[1] The opinion of the Texas Court of Civil Appeals is in direct conflict with this Court's holdings in **Rogers v. Missouri Pacific Railroad Company**, 77 S.Ct. 433, 352 U.S. 500, to the effect that "the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject

Petitioner's suit was based upon the Federal Employers Liability Act which has been held to impose upon the railroad employer the continuing non-delegable duty to provide the employee with a safe place in which to work, and which duty extends to the acts and conduct of the employer and its other employees. The proof showed that the engine foreman repeatedly contended that the determination of the manner in which the work was to be done was left to his discretion. Petitioner requested the Trial Court to give an instruction to the jury "that the Defendant Railroad is under a continuing non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonably safe place within which to work." The trial Court erroneously refused to give such instruction.[2]

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of the suit". This conflict will continue to plague litigants under this Act unless corrected, because even though it is not so, many trial courts consider the refusal of Writ of Certiorari of this Court as an approval of the lower court's decision, reasoning and result notwithstanding.

[2] The opinion of the Texas Court of Civil Appeals is in direct conflict also with this Court's holdings in **O'Donnell v. Elgin J. & E.**, 70 S.Ct. 200; 338 U.S. 384, and **Affolder v. New York C & St. L. R. Co.**, 70 S.Ct. 509; 339 U.S. 96, to the effect that "the plaintiff was entitled to a peremptory instruction" as to the railroad's liability for and what constituted a violation of the Safety Appliance Act without consideration of negligence or diligence. Also it is in conflict with the opinion in **Denny v. Montour R. Co.**, 101 F. Supp. 735 holding in effect that the Court was required to charge the jury that "a duty rested on the Defendant to provide the Plaintiff employee a safe place in which to work, and reasonably safe tool with which to work" in order that the doctrine of negligence could be applied to the facts. This conflict will continue and further frustrate litigant's rights under the Act in view of the popular misconception that a notation of certiorari denied means approval of the reasoning and result of the lower courts decisions.

The jury found that the occurrence in question was the result of an unavoidable accident, in answer to a Special Issue inquiring as to that conclusion. Objections to such special issue being submitted were likewise erroneously overruled.[3] Judgment was entered against Petitioner. Her appeals to the Texas Appellate Courts were denied.

The Texas Court of Civil Appeals has by its holding erroneously applied the law as determined by the federal Courts in these F.E.L.A. cases. It has applied a strict formula that denies the litigant the right to have a jury determine whether the employer's negligence played a part in his injury, by permitting the jury to pass upon only select special issues the Texas Courts feel covers the negligence. The jury is not permitted to find negligence generally upon the issues raised and supported by evidence. The jury is confined to a prior determination by the Texas Courts of what negligence they can consider. The Texas Courts do not even leave to the jury the determina-

[3] The submission to the jury by the Trial Court of the special issue inquiring as to "unavoidable accident" is in direct conflict with the holding in **Page v. St. Louis Southwestern Railway Company**, 312 F.2d 84, 93 and 349 F.2d 820 (decided August 10, 1965, rehearing denied September 22, 1965, published October 11, 1965) wherein Judge Rives and Brown in separate opinions concluded that an instruction on "unavoidable accident" is confusing and tends to distract the jury's attention from the single issues whether the carrier was negligent, causing in whole or in part the plaintiff's injury, and that in a charge properly structured, there is no need or place for such instruction. The continued resistance of the Texas state courts to the Federal Courts' interpretation of the Act even afflicts the lower Federal Courts. This type of restrictive practice should come to an end, and the liberal construction and application originally intended should prevail everywhere, even in Texas. This Honorable Court is the only source of correction.

tion of what conduct would constitute negligence. The jury can only pass on what conduct the Texas Courts dtermine to be negligence. They further cannot be advised of the effect of their answers to the Special Issues.

Which brings us to the refusal of the trial court to instruct the jury as to the continuing non-delegable duty owed by a railroad to its employees. Under Texas practice and procedure the jury is not permitted to know the rights and duties of the litigants. They therefore are not in any position to *know* what is negligence and what is not.

Thus the Texas Courts have by local practice and procedure deprived the Petitioner of her federally created rights under the Federal Employer's Liability Act as construed by the Federal Courts. This type of error is of such grave importance that Petitioner is compelled to speak out, not only for herself and children, but for all other litigants so improperly burdened in their litigation.

There were other errors raised and presented in the Petition for Writ of Certiorari, each of which should require reversal, but these first three are so important that it is felt this Honorable Court would be concerned if brought to its attention.

CONCLUSION

There are presented to this Honorable Court these questions of grave national concern involving the rights of litigants being frustrated by local practice and procedure. These errors should receive the attention of the Court, so that litigants will not be deprived of their federally created rights.

The errors raised are such that Petitioner feels a Rehearing of this Court's order denying her Petition for Writ of Certiorari be granted, and that this Court's Writ of Certiorari issue and that the judgment of the trial court and the Court of Civil Appeals for the 12th Supreme Judicial District of Texas be reversed and remanded for a new trial.

Respectfully submitted,

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Of Counsel:

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Houston, Texas

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

CERTIFICATE OF SERVICE

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

I, Max Garrett, one of the attorneys of record for the Petitioner, Mrs. Adelle Hullum, and a member of the Bar of the Supreme Court of the United States, depose and say that on the 17th day of November, 1965, I served triplicate copies of the foregoing Motion for Rehearing in the Supreme Court of the United States on Jack W. Flock, Esq. and Messrs Ramey, Brelsford, Flock & Devreaux and Clyde W. Fiddes, Esq. and Messrs. Calhoun & Clark at their present address; Citizens First National Bank Building, Tyler, Texas, by depositing same in a United States Post Office in the City of Houston, Texas, with first class postage prepaid, via Certified Mail. Tyler, Texas, is less than 500 miles from Houston, Texas.

Max Garrett

SUBSCRIBED AND SWORN TO before the undersigned authority on this the 17th day of November, 1965.

Tommy R. Letbetter

Notary Public in and for Harris County, Texas